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OF TRANSPORT TERMINALS IN
INTERNATIONAL TRADE
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COMPILATION OF COMMENTS AND PROPOSALS BY GOVERNMENTS
AND INTERNATIONAL ORGANIZATIONS
ON THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS
IN INTERNATIONAL TRADE

CONTENTS

	Page
INTRODUCTION	2
COMPILATION OF COMMENTS AND PROPOSALS	3
<u>Governments</u>	
CANADA	2
DENMARK	4
FEDERAL REPUBLIC OF GERMANY	5
JAPAN	11
PHILIPPINES	12
UNITED STATES OF AMERICA	13
<u>Intergovernmental organizations</u>	
INTERNATIONAL LABOUR OFFICE (ILO)	16
<u>Non-governmental international organizations</u>	
INSTITUTE OF INTERNATIONAL CONTAINER LESSORS (IICL)	17

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INTRODUCTION

This document sets forth the comments and proposals of Governments and international organizations on the draft Convention on the Liability of Operators of Transport Terminals in International Trade that were received as of 18 december 1990. As of that date comments and proposals had been received from the following Governments and international organizations:

Governments: Canada, Denmark, Federal Republic of Germany, Japan, the Philippines and the United States of America.

Intergovernmental organizations: International Labour Office

Non-governmental organizations: Institute of International Container Lessors

COMPILATION OF COMMENTS AND PROPOSALS

States

CANADA

[Original: English]

General comments

Following the adoption of the draft Convention on Liability of Operators of Transport Terminals in International Trade by UNCITRAL at its 22nd session, the Government of Canada held consultations with industry representatives and with the provincial and territorial governments of Canada with a view to assessing the impact of the proposed Convention on the transport terminal industry and on domestic laws.

Although some questioned the need for the proposed Convention at this time, most commentators supported the principle of international rules governing liability limits for operators of international transport terminals. The consensus was that there is a need for greater precision in the language of the proposed Convention. In addition, it remains the view of the Government of Canada that the limits of liability to be established in the draft Convention should be relatively unbreakable.

To the extent that the text of the proposed Convention differs from the text that was submitted to the Commission by the Working Group on International Contract Practices in 1988 (A/CN.9/298, annex 1), it has been improved. For example, the scope of application clause now indicates that the place where the services are performed should be one of the determining factors for the application of the proposed Convention. There will now be

three connecting factors in the scope of application clause, namely: place of business, place of performance of the services, and the rules of private international law. It is expected that in practice the "place of performance" will be the usual condition for invoking the Convention.

The intention of some Articles of the proposed Convention remain obscure. What follows are comments on some of those Articles and on others worthy of note.

Article-by-Article comments

Article 1: Definitions

The term "goods" is still vague on whether it includes empty containers. If the intention is that empty containers should not be considered to be "goods", except when in transport, this should be said. Similarly, it should be said that "goods" includes "bulk commodities".

Article 3: Period of Responsibility

It may be desirable to define what is meant by "taken in charge" so as to avoid litigation on the issue.

It is also unclear what is meant by "placed [...] at the disposal". There should be some objective way of determining when goods are placed at the disposal of the person entitled to take delivery of them, such as a written notice of discharge.

Article 5: Basis of Liability

Although it is understood that force majeure is implicitly a defence under paragraph (1), an explicit reference to force majeure would make the proposed Convention more easily understood by prospective users.

It is noted that the draft Article differs from the provisions of Article 18 of the Warsaw Convention as amended by Montreal Protocol No. 4.

Article 6: Limits of Liability

Paragraph 1(a) would be easier to understand if it specifically excluded goods handled by sea or by inland waters.

The measure of liability--units of account per kilogram of gross weight--could create problems for goods that are not shipped by weight but by volume or pieces.

It is noted that the possibility of making a special declaration of value, such as provided for in the Warsaw Convention, is not referred to in the draft Convention.

Article 11: Notice of Loss, Damage or Delay

The notice period for loss is very short. In very large consignments, it can take a considerable period of time before goods are opened and loss or damage is discovered. A longer notice period should be provided in paragraph 11(1). Three working days may not constitute sufficient time to properly process a claim.

It is noted that the proposed Convention does not stipulate where a claim should be brought as is the case with Article 28 of the Warsaw Convention.

It is not clear who is the person entitled to take delivery of goods. It may be a freight forwarder who normally does not inspect the goods.

DENMARK

[Original: English]

The Convention will make it easier for exporters, carriers and other intermediaries to understand their legal status in relation to operators of transport terminals who in other countries are engaged in international carriage.

If the desired goal is to be attained, it will, however, be necessary for the Convention to include rules on venue and choice of legislation and rules concerning the procedure of calculating compensation for lost or damaged goods.

According to the draft, the Convention shall regulate international carriage only, cf. Art. 1(a), excluding terminal operations which are not part of an international carriage or are independent of a carriage. The transport terminal operator will, however, not always know whether the carriage is taking place as part of an international carriage.

It will frequently be highly difficult to determine whether a carriage is national or international. What may be doubtful is whether a pre-carriage operation is to be considered a national carriage or a part of an international carriage.

The definition of the term "international" in the draft may raise doubt as to whether the carriage agreements or the purchase agreements, or the production site or the final destination shall be determining.

Article 3 concerning the period of responsibility of the operator should be pinpointed.

It appears unfortunate that the physical location of the terminal - whether at dockside or inland - should be considered important, as is the case in Article 6.

The rules on the rights of security in goods of the terminal operator under Article 10 should be specified more precisely.

Specific comments on the provisions of the draft Convention will be made at the Conference.

FEDERAL REPUBLIC OF GERMANY

[Original: English]

The Federal Government welcomes the Draft Convention prepared by the United Nations Commission on International Trade Law as a sound and solid basis for the deliberations at the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade. The following observations and proposals are submitted for consideration.

1. Period of responsibility

The diversity of operations to which the Convention shall apply has been widened during the preparatory work. The original Draft Convention was designed to cover safekeeping operations such as warehousing. The present Draft Convention applies also to the direct transfer of goods from one means of transport to another (handling operations without safekeeping; cf. article 4(2), sentence 2).

However, the wording of article 1(a), (c) and article 3 of the Draft Convention does not yet reflect this change, because the key expression "to take in charge" covers only part of the ground. The terminology should therefore be supplemented by an expression referring to handling operations.

Proposals:

The first sentence of article 1(a) should read:

"'Operator of a transport terminal' (hereinafter referred to as 'operator') means a person who, in the course of his business, undertakes to take in charge or to handle goods involved in international carriage in order to perform or to procure the performance of transport-related services with respect to the goods in an area under his control or in respect of which he has a right of access or use."

Article 1(c) should read:

"'International carriage' means any carriage in which the place of departure and the place of destination are identified as being located in two different States when the operator takes the goods in charge or takes them over for handling;"

Article 3 should read:

"The operator shall be responsible for the goods from the time he has taken them in charge or taken them over for handling until the time he has handed them over to or has placed them at the disposal of the person entitled to take delivery of them."

2. Segmented transport

There should be no doubt that purely domestic legs of segmented international transport, if identified as being subject to individual domestic transport contracts, shall not be governed by the Convention. In order to clarify this inherent delimitation of the concept of "international carriage" the present Draft Convention should be amended accordingly.

Proposal:

The following sentence should be added to article 1(c):

"If and to the extent that any segment of a carriage is identified as being performed under an individual domestic transport contract in respect of which the place of departure and the place of destination are not located in two different States, such domestic carriage shall not be considered to be an 'international carriage'."

3. Identification of internationality

The carriage is considered to be international if the places of departure and destination are "identified" as being located in two different States. One decisive criterion for ascertaining the internationality of a carriage is the transport documents accompanying the goods. The use of an international transport document (e.g. CMR or CIM document) should constitute a presumption that the carriage is international. If national documents are used the opposite presumption should apply.

Proposal:

The following sentence should be added to article 1(c):

"Goods accompanied by an international transport document shall be deemed to be involved in international carriage; goods accompanied by a domestic transport document shall be deemed not to be involved in international carriage."

4. Basis of liability

According to article 5(1) the liability of the operator is based on the presumption that he failed to take all measures that could reasonably be required to avoid the occurrence and its consequences. This presumption is not justified when the operator cannot exercise full control over the goods for reasons which serve the purposes of his customers. This happens particularly when the operator grants access to the goods for inspection or treatment by their owners or others entitled to dispose of them. In the case of such permitted third-party activities the likelihood of damage caused by an act or default of the operator is not greater than the likelihood that the loss of, or damage to the goods had been caused by others. A corresponding exception to the general rule of article 5(1) should be added.

Proposal:

A new paragraph 1 bis should be added to article 5(1):

"If, at the time of the occurrence, the customer or other persons were granted access to the area referred to in article 1 subparagraph (a) to inspect, treat or handle the goods, it is up to the claimant to prove that the operator, his servants, agents or other persons of whose services the operator makes use for the performance of the transport-related services failed to take all measures that could reasonably be required to avoid the occurrence and its consequences."

5. Limitation of liability

Article 6(1) draws a line between transport-related services in general and the handling of goods which the operator receives immediately after carriage by sea or by inland waterways or which are to be handed over by him for such carriage. This dual-limit approach is based on the assumption that the average value of shipped cargo is significantly lower than the value of goods carried by other means of transport. However, since vehicles and electronic or other equipment of considerable value have become a common object of carriage by sea, this assumption no longer reflects reality. Thus, only certain specific categories of goods and not different modes of carriage can justify different limits of liability.

Moreover, with respect to bulk cargo, railway lines and inland navigation vessels compete on the same freight market. Different liability conditions at transport terminals would have an impact on their position.

Both aspects lead to the following suggestion.

Proposal:

Subsection (b) of article 6(1) should be deleted.

As to the further content of article 6(1) see next proposal.

6. Alternative limitation of liability

The Draft Convention provides for a limitation which is exclusively based on the gross weight of the goods lost or damaged. This approach proves unsatisfactory. The Federal Government holds the view that the Convention should follow the alternative approach of sea-borne trade as contained in article 4(5) of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 1924, as amended by the 1968 Protocol (Hague-Visby Rules) and in article 6(1) of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules). If one proceeds on the assumption that the Convention shall also facilitate recourse actions by carriers, forwarders and insurers to recover damages from the terminal operator, the Convention should provide for an alternative limitation of liability per package/freight unit or per kilogram of gross weight of the goods, whichever is the higher.

The Federal Government admits that difficulties may arise where goods are unitized (e.g. consolidated in containers or on pallets). However, if one follows the model of article 6(2) of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules), such difficulties are not insuperable. In particular, there would be no need for a complex documentation under article 4(1) of the Draft Convention. The customer would have to prove the number of packages or units as a basis for calculating his claim. If he cannot do so by using a document signed or issued under article 4(1) of the Draft Convention, he should be able to use other transport documents accompanying the goods.

Proposal:

Article 6(1) should read:

"The liability of the operator for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount not exceeding [....] units of account per package or other freight unit, or [....] units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher."

The following article 6 (1 bis) should be added:

"For the purpose of calculating which amount is the higher in accordance with paragraph (1) of this article, the following rules apply:

(a) Where a container, pallet or similar article of transport or packaging is used to consolidate goods, the packages or other freight units enumerated in the document under article 4 paragraph (1) or, in the absence of such enumeration, the packages or other freight units enumerated in any other document accompanying the goods [and acknowledged by the operator without specific reservations] are deemed to be packages or other freight units. Except as aforesaid the goods consolidated in such container or on such pallet or any similar article of transport or packaging are deemed to be one single unit.

(b) In cases where the container, pallet or similar article of transport or packaging itself has been lost or damaged, that article of transport or packaging, if not supplied by the operator, is considered one separate unit."

7. Aggregation of claims

The present Draft Convention does not set any limit to the aggregate amount of claims resulting from the same event. But under a mandatory liability regime the operator should not be exposed to the incalculable and barely insurable risk of an unlimited aggregation of claims, even if such claims are limited individually. It may be difficult, if not impossible, to find a formula for calculating differing overall amounts that would fit every individual type and size of transport terminal. The Convention should therefore fix one single relatively high amount.

Proposal:

After article 6 the following new article 6 bis should be added:

"In no case shall the liability of the operator for the aggregate of all claims arising on any distinct occasion which are assessed under the preceding articles exceed ... million units of account. If such aggregate of claims exceeds ... million units of account, that amount shall be distributed among the claimants in proportion to their claims."

8. Loss of limitation of liability

During the preparatory work views differed widely on the question whether the operator should lose the benefit of the limitation of liability in the case of his own intentional or reckless conduct as well as in the case of intentional or reckless acts of his employees. Basically, the present Draft Convention is modeled on the concept of vicarious liability, rendering the limitation of liability quite easily exceedable. The Federal Government

doubts whether this is the best approach. It may be more appropriate to make the limits of liability more reliable and at the same time increase the limitation amounts suggested in the Draft Convention. Higher limitation amounts would not only improve the chance of the customer to recover damages but also justify the restriction of the exceedability of limitation amounts to cases where the operator himself (or the corporate representative of a transport terminal company) can be blamed for wilful misconduct.

Proposal:

The words "or his servants or agents" in article 8(1) should be deleted.

9. Right of retention

Article 10(1) provides for a right of retention which the operator shall enjoy with respect to the goods for services rendered during the period of his responsibility. UNCITRAL adopted a proposal to grant such a right of retention also for services rendered after that period (cf. Report on the work of the 22nd session of UNCITRAL, Official Records, 44th General Assembly, Supplement No. 17, paragraphs 126 and 207). The Draft Convention, which does not reflect this decision, should be amended accordingly.

Proposal:

The first sentence of article 10(1) should read:

"The operator has a right of retention over the goods for costs and claims which are due in connection with the transport-related services performed by him in respect of the goods during or after the period of his responsibility for them."

10. Right of sale

Article 10(3) provides in its first sentence for a conflict of laws rule relating to the requirements and legal effects of an operator's right of sale. During the preparatory work it was understood that the possible conflict between the right of sale and any property rights of third parties in the goods should not be dealt with by the Convention (cf. preparatory documentation A/CN.9/260, paragraph 66, A/CN.9/WG.II/WP.56, Article 10, comment 6). Irrespective of this general approach a special provision has been added to article 10(3) according to which the conflict of laws rules contained in the first sentence of article 10(3) shall not apply to containers which are owned by a party other than the carrier or the shipper. Literally construed, such a provision means that the general principles of private international law do apply. The Federal Government doubts whether it makes much sense to split up the conflict of laws rule with respect to different categories of goods. It would prefer to have all issues relating to the sale of goods and to the rights of third parties in the goods dealt with by the applicable national law according to the general principles of private international law.

Proposal:

Paragraph (3) of article 10 should be deleted.

11. Limitation period

There are several provisions dealing with time periods in the Draft Convention. Some of the periods commence on the day of a "request", others on the day of a "notice". Paragraph (2)(b) of article 12 refers to a notice of the loss of the goods without indicating whether the limitation period was to commence from the time of dispatch or of receipt of such notice. Other provisions such as paragraphs (3) and (4) of article 5 provide for a specific time period after receiving a request. Article 12(2)(b) of the Draft Convention should be brought in line with such provisions.

Proposal:

Article 12(2)(b) should read:

"In cases of total loss of the goods, on the day the person entitled to make a claim that the goods are lost receives a notice from the operator stating the loss, or on the day that person may treat the goods as lost in accordance with paragraph (4) of article 5, whichever is earlier."

12. Entry into force

The number of ratifications required for the Convention to enter into force provided for in article 22(1) of the Draft Convention should be increased considerably.

The above observations should not be regarded as being exhaustive. The Government of the Federal Republic of Germany reserves the right to submit further proposals during the Diplomatic Conference.

JAPAN

[Original: English]

The Government of Japan is of the opinion that the draft Convention as contained in the document A/CONF.152/5 is a good basis for discussion at the international conference of plenipotentiaries. It seems appropriate, however, to make the following comments which would serve to improve several provisions of the draft Convention.

The following comments are submitted without prejudice to any final position to be taken by the Japanese Government at the Conference.

1. Article 1(a)

It is not quite clear under Article 1(a) whether the Convention applies to stevedores who are covered by applicable rules of law governing carriage. Considering the purpose of the Convention, which is to fill gaps between existing liability regimes for transportation, it would not be appropriate to allow stevedores to be exempted from the scope of the Convention by merely inserting in bills of lading a clause extending the same protection provided for carriers to stevedores.

This uncertainty could be eliminated by inserting a phrase "as a carrier or multimodal transport operator" after the word "responsible" in the second sentence of Article 1(a).

2. Article 4(a)

Under Article 4(1) the operator shall sign a document or issue a signed document when he is requested by a customer to do so. Our concern here is the fact that there is no time limit to the customer's request. Under the present provisions of Article 4(1), the operator can be obliged to sign or issue a document even after a suit against him is brought by the customer. A time limit of reasonable length should be set to the customer's right to request a document.

3. Article 10(1)

At the twenty-second session of UNCITRAL, it was understood that the operator's right to retain the goods under the first sentence of Article 10(1) should be extended to cover costs and claims incurred after the expiration of his period of responsibility. The provision should be aligned with this understanding.

4. Article 11(2)

The term "final recipient" in the provisions of Article 11(2) needs clarification in that it should be aligned with the understanding of the Working Group on International Contract Practices at its eleventh session that the term refers to a person who would be in a position of inspecting the goods (A/CN.9/298, paragraph 69). This could be resolved by inserting a phrase "who is in a position of inspecting them" after the words "final recipient".

Further consideration might be given, in this regard, to taking care of a case where the final recipient of the goods refuses to take delivery of them.

5. Article 21

Meaning of "declarations" is not defined in Article 21 itself. If they refer to the declarations set forth in Article 19, the order of Articles 20 and 21 should be reversed, and the wording "this Convention" in the first line of present Article 21(1) should be replaced by "Article 19".

PHILIPPINES

[Original: English]

Comments of the Philippine Ports Authority on the draft Convention
on the Liability of Operators of Transport Terminals
in International Trade

Based on the provisions of Philippine Ports Authority (PPA) Administrative Orders No. 13-77 and No. 10-81, entitled "General Port Regulations of the Philippine Ports Authority" and "General Conditions of All Contracts/Permits for the Management and Operations of Cargo Handling Services", respectively, hereunder are our comments and proposals on the matter:

1. Paragraph (3) of Article 5 clarifying the occurrence of delay when the operator fails to hand over the goods for the disposal of the person entitled to take delivery of them within the time expressly agreed upon or, in the absence of such agreement, within a reasonable time after receiving a request for the goods by such person should specifically mention the exact or definite period, say within fifteen (15) days from receipt of such request.
2. Relative to the provision of paragraph (4), Article 5, and paragraphs (5) and (2) of Article 11, PPA regulations state that on failure of a contractor to deliver the goods, which should commence within one hour after presentation of a delivery permit by the cargo owner or his duly authorized representative, the contractor shall furnish upon request, a certificate showing shortage, damage or loss of cargo. The request for certification of loss or non-delivery shall be made within thirty (30) days from the date of delivery of the last package to the cargo owner. On the other hand, the issuance of certification of non-delivery should be made within fifteen (15) days from receipt of a written request for certification. Failure on the part of the contractor to act on the request means certification is deemed issued. Thereafter, a person entitled to make a claim shall file a formal request together with the necessary copies of Bill of Lading, Invoice, Certified Packing List and computation arrived at covering the loss, within fifteen (15) days from date of issuance by the contractor of a certificate of non-delivery.
3. On the limits of liability under paragraphs (1) and (2) of Article 6, PPA regulates that the Operator shall be liable for the loss, damage or non-delivery of cargoes to the extent of the actual invoice value of each package, which in no case shall be more than P 3,500.00 for each package unless the value of the cargo importation is otherwise specified in writing together with the declared bill of lading value and supported by a certified packing list.

The other provisions of the draft Convention intended for international acceptance are in conformity with the local regulations on claims and liability for losses and damages except of course on certain PPA procedures and the foregoing limitation in the payment of claims that is expressed in pesos.

Since the Convention aims to establish an internationally uniform rule on the liability of operators of transport terminals in international trade, this Authority shall highly appreciate being informed of the ultimate outcome of the Plenipotentiary Conference of UNCITRAL which will be convened from April 2-19, 1991, in Vienna. Amendments of related local regulations may be considered, if needed, to be consistent with the draft for final adoption.

UNITED STATES OF AMERICA

[Original: English]

The United States agrees that the draft Convention on the Liability of Operators of Transport Terminals in International Trade, approved by the United Nations Commission on International Trade Law in May, 1989 (United Nations document A/CONF.152/5, 13 March 1990), is an appropriate point of

departure for the work of the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade in Vienna in April, 1991. However, the United States has the following comments on the draft Convention, including certain substantive modifications of the Convention that it believes should be adopted (underlined), with drafting improvements left for consideration at the Conference:

Article 1: Definitions

1. Description of "Goods": It is the U.S. interpretation of Article 1(b) that empty containers, in a storage yard for empty containers, are not subject to the Convention. The Convention on the Liability of Operators of Transport Terminals concerns transport-related services to goods; it includes containers and packaging within the Convention only to the extent that they are used for consolidation or packaging of goods. The Convention itself or the negotiating records of the Convention should clarify that empty containers, in a storage yard for empty containers, are not subject to the Convention.

2. "Writing": "Writing" is not defined in the definition section of the draft Convention. The term is used in the Convention, for example in Article 12(4). It would be an improvement if electronic writing could be recognized formally as an acceptable form of writing. This recognition could best be made in Article 1, as follows:

"For the purposes of this Convention 'writing' includes electronic writing".

Article 4: Issuance of Document

The United States strongly believes that there is a need for flexibility in the documentation requirements. It is anticipated that the document will normally be a carrier's bill of lading presented to the terminal operator; thus, the current formulation of Article 4(1)(a) is satisfactory. It is in the interest of the customer to be able to choose an inexpensive and quick method of documentation, while at the same time retaining the right to require the operator to issue a document under Article 4(1)(b) where the nature of the goods or the marketing situation makes it necessary for the customer to know the condition and quantity of the goods at this stage of the shipment. It would be especially burdensome (and costly) for stevedores to be required to state the condition and quantity of the goods during loading or unloading operations.

If additional requirements were to be added to the already existing provisions, the United States believes a qualification of such additional requirements should be added, such as "to the extent required by local circumstances", so as to limit the necessity for further requirements to those countries which really need them.

The further qualification "as far as they can be ascertained by reasonable means of checking" would be necessary to ensure that stevedores or terminal operators do not open sealed containers--a procedure that would surely delay and even imperil the movement of the goods.

Under Article 4(4) the signature of the operator may be made by electronic or any mechanical means "if not inconsistent with the law of the

country where the document is signed". While this paragraph is modeled on a similar provision in the Hamburg Rules (Article 14(3)), the United States favors the formulation of the United Nations Convention on International Bills of Exchange and International Promissory Notes (Article 5(k)--"Signature means a handwritten signature, its facsimile or an equivalent authentication effected by any other means; ...") which is intended to facilitate international trade to the greatest possible extent. That provision does not make a qualification regarding consistency with local law.

Article 6: Limits of Liability

The United States accepts the principle that liability should be limited. However, the United States believes that adequate allowance should be made for erosion through inflation. The value of the SDR has declined because of world-wide inflation. The IMF deflator, based on the relative value of currencies making up the SDR basket, went from 1 in 1979 to 1.4936 in 1987 (see IMF International Financial Statistics, 1988). For example, the Multimodal Convention's limits have now been reduced to 73% of their original value in 1980. These limits have declined further in real value during the period 1987-90. Consequently the limitation of liability to be specified in the terminal operators' Convention should make appropriate allowance for inflation erosion of the liability limits set by other conventions.

It is the United States' view that the approaches to establishing liability limits in other liability conventions, for example the Hamburg Rules, are not necessarily appropriate for use in the Convention on the Liability of Operators of Transport Terminals. The subject matter of the terminal operators' Convention differs from that of the Hamburg Rules and the other liability conventions. For example, there is no issue of negligent navigation in the terminal operators' Convention whereas negligent navigation was a significant bargaining chip in the Hamburg Rules negotiation.

The United States believes that the participating States, in establishing liability limitation, should examine issues such as the value of goods handled by operators, the costs of transport-related services, insurance costs, the average level of damages awarded against operators for loss of or damage to goods or delay in handling over the goods, and the utility expenses of terminal operators; also relevant are the limits of other transport-related conventions. (See Article 24(4), criteria in determining whether limits should be amended.)

Finally the actual limitation on liability should depend on resolutions of the issues of burden of proof, breakability of limits and defenses to liability, because limitation of liability is only one of several ways of allocating risks between the terminal operator and his customers.

Article 7: Application [of defenses and liability limits] to Non-contractual Claims

Article 7(3) provides that the aggregate of compensation recoverable from servants, agents or independent contractors shall not surpass the liability limits under the Convention. A question has arisen whether servants, agents and independent contractors would be bound by an operator's agreement to increase liability limits as provided under Article 6(4). The United States is of the view that the servants, agents and independent contractors should not be affected by the operator's contractual agreements to increase liability limits. Thus it is proposed to add to Article 7(3) a sentence stating:

"Such aggregate shall not be affected by the operator's contractual agreements under Article 6(4) to increase liability limits."

Article 10: Rights of Security in Goods

The terminal operator is sometimes disadvantaged by unclaimed goods which occupy valuable space needed for other purposes. Therefore, the United States proposes that a new subparagraph be added as follows:

"(5) The terminal operator may consider goods in its charge abandoned if not claimed within () days after (i) the day until which the operator has agreed to keep the goods, or (ii) if such agreement has not been concluded, the date as of which notice of availability of the goods had been given by the operator to the person entitled to take delivery of the goods."

Article 12: Limitation of Actions

To conform with the above-proposed new paragraph (5) to be added to Article 10, an adjustment should be made in Article 12, paragraph (2), as follows:

"(2) The limitation period commences:

(a) on the day the operator hands over the goods or part thereof to, or places them at the disposal of, a person entitled to take delivery of them, or considers the goods as abandoned in accordance with paragraph (5) of Article 10, or".

No change is proposed for subparagraph (b) of paragraph (2).

Article 15: International Transport Conventions

Article 15, insofar as it refers to "rights or duties which may arise under an international convention relating to the international carriage of goods which is binding on a State which is a party to this Convention", is satisfactory. It is the view of the United States that the proper purpose of this article, like the purpose of similar articles in other UNCITRAL-prepared conventions, is to exclude from the scope of application of this new Convention all matters already covered by existing conventions in order to avoid confusion, conflict and overlapping provisions.

However, the proviso in Article 15 "or under any law of such State giving effect to or derived from a convention relating to the international carriage of goods," raises fundamental questions regarding the relationship of treaties to unilaterally enacted domestic law. The proviso as drafted may be used unilaterally to vary the mandatory provisions of this Convention which was designed to be uniform, by applying domestic laws allegedly derived in part from some other multilateral or bilateral transport convention. It is especially important in a convention designed to fill gaps that uncertainty not be introduced through domestic laws derived from international conventions. Accordingly, the United States proposes the deletion of the aforementioned proviso.

Article 22: Entry into Force

The United States shares the view of many countries that this Convention is not linked to the 1978 Hamburg Rules and thus need not require 20 ratifications or accessions to be brought into force as do the Hamburg Rules.

It is relevant at this point to consider other multilateral conventions: The Hague Rules of 1924 required no minimum number of ratifications and entered into force in 1931 with four ratifications; the Visby Amendments of 1968 required 10 ratifications and entered into force in 1977; the SDR Protocol of 1979 required 5 ratifications and came into force in 1984. The Multimodal Convention of 1980 requires 30 ratifications and has not yet come into force. Accordingly, the United States proposes that this Convention enter into force when 5 States have ratified or acceded to it.

Intergovernmental organizations

INTERNATIONAL LABOUR OFFICE (ILO)

[Original: English]

The International Labour Office communicated to the Executive Secretary of the United Nations Conference on the Liability of Operators of Transport Terminals the following observations by the International Transport Workers' Federation (ITF):

"The ITF, on behalf of employees working in transport terminals, particularly road transport workers, railway workers and dockers, is seriously concerned about the proposed wording in paragraphs 7(2) and 8(2) of the proposed Convention. In particular we object strongly to the inclusion of the words "if he proves that he acted within the scope of his employment or engagement by the operator" in paragraph 7(2). In our view an employee of an operator has no contractual liability towards a consignor or consignee. The employee's obligation is towards his/her employer and is defined by the relevant employment contract and associated labour law. Ideally we would prefer all actions undertaken by a servant or agent of an operator to be covered by the liability limits of the Convention, something which we believe can simply be achieved by the deletion proposed above.

We certainly cannot accept that, as is the case with the proposed wording, the burden of proof should be with the employee to show that he was acting within the scope of his employment rather than with the person bringing the action to show that he was not.

For similar reasons we would prefer the deletion of 8(2). The type of action described here would normally be dealt with under criminal law."

Non-governmental international organizations

INSTITUTE OF INTERNATIONAL CONTAINER LESSORS (IICL)

[Original: English]

IICL comments in support of article 10(3)

IICL 1/ submits these comments in support of the limitations set forth in Article 10(3) on the right of the operator of a transport terminal to sell containers over which he has exercised a right of retention. Under Article 10(3) the operator is entitled to sell goods as to which he has exercised a right of retention except for "containers, pallets or similar articles of transport or packaging ... owned by a party other than the carrier or the shipper and ... clearly marked as regards ownership" (with certain exceptions for repairs or improvements).

IICL asks that Article 10(3) be approved as written. The present text is a compromise. Originally IICL argued that the operator should have no security in a leased container. In the United States it is not clear whether the operator would have security. There is some authority in the United States that a warehouseman (i.e., the operator) has a lien where the person depositing the property with the warehouseman has such an interest that he could pledge the property for value. A ship line would not have such an interest in a leased container. In some European jurisdictions it appears that there is a right of retention but no right of sale or such a right only after a court order.

The purpose of the compromise is to encourage a negotiation between the operator in possession of the container and the container lessor. Each has an interest in the exchange of the container for payment. A right of sale in the operator would tip the balance against the lessor who had no responsibility for leaving the container with the operator. The present text achieves a proper balance and provides an incentive to benefit both parties.

1/ IICL is the Institute of International Container Lessors and is the trade association for the international marine cargo container leasing industry. The container is marked as to leasing company ownership in large letters on each of the four sides and other places as well.